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No. 88-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

– against –

JOSEPH M. GIARRATANO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ROBERT D. RAVEN
President, American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Attorney for the American Bar Association as Amicus Curiae and Counsel of Record

RONALD J. TABAK
GEORGE H. KENDALL
SARA-ANN DETERMAN
CLIFFORD D. STROMBERG
Of Counsel

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INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") submits this brief as amicus curiae to provide the Court significant information about the national context in which this case has arisen. The consents of both the petitioners and the respondents

have been obtained and are on file with this Court.

The ABA is a voluntary, national membership organization of the legal profession. Its more than 350,000 members, from each state, territory and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields. Since its inception over a century ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel as a crucial element in ensuring fundamental fairness in our adversary system of criminal justice.

The ABA has taken no position regarding the propriety or constitutional-

ity of the death penalty, and it does not discuss herein the specific constitutional law which the parties' briefs are addressing. The ABA has, however, been working to ensure that the death penalty is not imposed without the most careful consideration and full compliance with defendants' constitutional and legal rights. To this end, the ABA initiated in 1986 a Death Penalty Post-Conviction Representation Project. The project attempts to locate volunteers to represent death row inmates and supports efforts to create an organized structure for providing qualified, compensated counsel in capital post-conviction proceedings. The ABA has also over the past several years commissioned several studies on the actual experiences of counsel handling post-conviction death penalty cases. Hence, to the extent that the constitutional issue in this case

turns on what actually constitutes "meaningful access" to the courts for death row inmates in state post-conviction proceedings, the ABA believes it can provide the Court with important insights.

The ABA has concluded that if state post-conviction proceedings are to help ensure that no person is put to death following a trial tainted by serious constitutional error, capable attorneys must be provided to death row inmates before their post-conviction petitions are filed. The ABA has also concluded that there simply are not, and will not be, enough volunteers to represent properly the ever-increasing numbers of death row inmates whose cases are proceeding into state post-conviction proceedings. Hence, even while trying to find volunteers to handle cases as a stop-gap measure, the ABA has recognized that the only feasible way to

provide death row inmates with meaningful access to the courts is the implementation in each state which imposes capital punishment of a governmentally-funded system under which qualified, compensated attorneys represent death row inmates in state post-conviction proceedings.

The ABA's current intensive efforts to encourage the creation of such a system in each death penalty state is a logical outgrowth of prior ABA actions, including its House of Delegates' adoption of three resolutions in the past decade. In 1979, the ABA proposed "that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions, if necessary, in death penalty cases where the defendant cannot afford to

hire counsel * * *."[1] In 1982, the ABA resolved to "support the prompt availability of competent counsel for both state and federal court proceedings" in post-conviction and habeas corpus. The ABA also stated that counsel handling such proceedings "should be trained to present in the state courts the facts and legal precedents which form the basic federal constitutional issues raised by the cause" and should be compensated "at a fair rate of payment * * *."[2]

Most recently, in 1988, the ABA urged "each federal district and circuit court to adopt and each federal circuit

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[1] Resolution 102B, approved by ABA House of Delegates at 1979 Midyear Meeting. Should the Court be interested, the ABA would be willing to lodge with the Clerk of the Court a copy of Resolution 102B and the other sources cited in this brief.

[2] Resolution 112D, approved by ABA House of Delegates at 1982 Annual Meeting.

judicial council to approve a plan for providing representation in federal habeas corpus death penalty proceedings which includes" a variety of provisions designed to ensure that trained, experienced and pre-screened attorneys (a) are appointed to represent death row inmates, (b) are properly compensated, (c) are provided with investigative, expert and other services, and (d) are advised by state and regional resource centers.[3] The 1988 ABA resolution became the basis for the new Paragraph 2.01G to the Guidelines for the Administration of the Criminal Justice

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[3] Resolution 125, approved by ABA House of Delegates at 1988 Midyear Meeting. Resolution 125 also urged the federal courts "to consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency concerning the standards and procedures governing appointment of counsel in state and federal post-conviction proceedings involving death penalty cases."

Act, 18 U.S.C. § 3006A, which was approved by the Judicial Conference of the United States in September 1988.

SUMMARY OF ARGUMENT

The ABA believes that death row inmates cannot meaningfully articulate or litigate their factually and legally complex claims in state post-conviction proceedings without representation by capable counsel. The existence of many significant claims cannot be determined from death row. Moreover, many death row inmates lack the mental capacity to formulate even bare-bones post-conviction petitions. Where the consequence of failing to uncover and argue effectively about serious constitutional violations is the prisoner's death, the injustice is especially harsh. Meaningful access to state post-conviction remedies can be achieved only if the state government provides the

prisoner with properly qualified, compensated, assisted and monitored counsel.

The judiciary, the organized bar and Congress have all taken actions designed to provide counsel to death row inmates, and substantial progress has been made in many states. However, Virginia is almost unique in having failed to make any movement towards a system for providing its death row inmates, through qualified counsel, with meaningful access to state post-conviction courts. In the absence of such access, there is a grave risk that persons will be subjected to the ultimate penalty despite convictions or sentences imposed through fundamental constitutional error.

Argument

I.

MEANINGFUL ACCESS TO STATE POST-CONVICTION COURTS REQUIRES CAPABLE AND PROPERLY COMPENSATED COUNSEL

A. State Post-Conviction Proceedings In Capital Cases Are Extremely Significant And Extraordinarily Complex

Post-conviction proceedings in capital cases are both tremendously important and highly complex. They are often essential to the vindication of a capital defendant's rights to a fair trial and to a reliable capital sentencing proceeding, since they frequently concern issues which could not reasonably have been raised at trial or on direct appeal. Their significance is evident from the large percentage of cases in which convictions or sentences have been set aside in federal habeas corpus proceedings because of fundamental constitutional error -- following exhaustion of the constitutional claims in state

courts. Former Chief Judge Godbold said in 1987 that in the Eleventh Circuit, which generally "handles more habeas death penalty cases than all the other circuits in the United States combined,"[4] the writ had been granted in half of the first 56 capital cases to come before the District or Circuit Court, and he guessed "that probably now a third of the cases have constitutional error of such dimension that the petitioner is entitled to an order."[5]

Judge Godbold has also stressed the enormous complexity of these cases, stating, "the body of law that exists is complex. It's difficult. It's change-

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[4] Godbold, Pro Bono Representation of Death Sentenced Inmates, 42 The Record of the Association of the Bar of the City of New York 859, 862 (1987).

[5] Id. at 873.

able. And it's very hard to apply."[6] Indeed, he has stated that, "it is the most complex area of the law I deal with,"[7] and that "the average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."[8]

Increasingly, state judges, too, have come to recognize the tremendous complexity of capital litigation. For example, Maryland Court of Appeals Chief Justice Robert C. Murphy stated in his 1987 annual message to the General Assembly that the proper application of capital punishment statutes

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[6] Id. at 865.

[7] "You Don't Have To Be A Bleeding Heart," dialogue between Judge Abner J. Mikva and John C. Godbold at the Conference of Southern Bar Presidents held at the ABA 1986 Midyear Meeting, 14 Human Rights 22, 24 (Winter 1987).

[8] Id.

> proved extremely difficult and complicated, resulting in a high incidence of appellate reversals * * * because the Constitution of the United States, or the provisions of the death penalty statutes themselves, were violated in a way that mandated that new trials or resentencing hearings will be held.[9]

B. Pro Se Death Row Inmates Cannot Be Expected To Prepare Petitions Stating Their Meritorious Claims

Death row inmates cannot reasonably be expected to prepare state post-conviction petitions setting forth constitutional claims which, if properly articulated, would immediately be recognized as

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[9] Chief Justice Robert C. Murphy, Court of Appeals, Maryland, State of the Judiciary Message, Jan. 28 1987, delivered to a Joint Session of the General Assembly of Maryland, at 12-13. See also Evans v. State, 441 So. 2d 520, 528 (Miss. 1983) (Robertson, J., dissenting), cert. denied, 467 U.S. 1264 (1984) (As "frequently" occurs, "numerous important and highly technical death penalty issues" which are wholly unfamiliar to "the average Mississippi criminal defense lawyer" were "not raised" although "[m]ost * * * have resulted in death sentences being vacated in other cases.").

substantial and ultimately be held meritorious. This is so because of (1) the nature of many such claims, whose very existence cannot be determined from death row and (2) the inability of many death row inmates -- due to such problems as illiteracy, mental retardation and mental illness -- to articulate even those claims which theoretically could be formulated from death row.

1. The Existence Of Many Meritorious Claims Cannot Be Determined From Death Row

Experience has demonstrated that many meritorious constitutional claims cannot possibly be pleaded, even in a primitive way, by a pro se death row litigant. Determining that there is a factual basis for these claims requires the collection and evaluation of facts outside the existing record.

For example, without the assistance of counsel, the petitioner in Amadeo v. Kemp, 108 S.Ct. 1771 (1988), could not have known, much less alleged, that his conviction and death sentence were unconstitutional. The fact that the prosecutor had deliberately but surreptitiously induced the jury commission to underrepresent blacks and women in jury pools was uncovered by counsel in an unrelated case, and evidence supporting Amadeo's claim for relief was then marshalled and litigated by volunteer counsel for several years.[10]

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[10] Other capital convictions and sentences have also been held unconstitutional on the basis of racial discrimination whose existence could not have been determined from death row. The discrimination has been uncovered only through volunteer counsel's laborious review of jury lists to identify the race and sex of thousands of jurors. See, e.g., Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988) (unconstitutional underrepresentation of women); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (women unconstitutionally excluded in grand and petit jury selection procedure).

A frequently meritorious claim which could not be formulated from death row is that the prosecution withheld at trial information that was either exculpatory or else showed that a prosecution witness had struck a deal as a price for testifying. Determining that such unconstitutional prosecutorial conduct has occurred requires careful investigation which a death row inmate cannot undertake.

For example, the conviction and death sentence were reversed in Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), after it was established that the prosecutor had withheld evidence that a key eyewitness -- who at trial had positively identified Lindsey as the assailant -- had told the police shortly after Lindsey's arrest that he could not identify the perpetrator. The facts supporting this claim were developed in state and federal post-

conviction proceedings in which Lindsey, who was mentally retarded, was represented by counsel. Id. at 1038-40.[11]

Similarly, counsel's post-conviction investigation uncovered unconstitutional prosecutorial misconduct directed against Warren McCleskey. The federal district court held, on the basis of this new evidence, that state authorities unconstitutionally planted a witness in the cell next to McCleskey's and actively solicited information from the witness long after McCleskey had obtained counsel. McCleskey v. Kemp, No. C87-1517A (N.D. Ga. Dec. 23, 1987).

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[11] The Fifth Circuit said its "reading of the evidence shows there is a real possibility that the wrong man is to be executed." 769 F.2d at 1043. See also McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (failure to disclose reports raising questions about reliability of the identification violated due process).

In other cases, counsel working on post-conviction proceedings have uncovered facts which have raised such serious doubts about death row inmates' guilt or innocence that their convictions have been overturned. In a recent example, John Henry Knapp was released in 1987 after spending 12 years on Arizona's death row. His pro bono attorneys, who worked more than 3,000 hours and spent over $75,000 in out-of-pocket expenses, presented expert testimony that the fire which killed Knapp's children could have been caused by the children's playing with matches. At trial, the prosecution's experts had testified that only a flammable liquid could have caused the fire.[12]

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[12] See Smethurst, "Knapp Update: 'Innocent Man,'" American Lawyer (April 1987), at 80; United Press Int'l, Feb. 14, 1987 story (LEXIS, Nexis library, current file). The murder charges against Knapp were subsequently dismissed without prejudice. See United Press
(Footnote continued)

Ineffective assistance of counsel is another constitutional claim for which the essential factual predicates have often been uncovered only in counsel's post-conviction investigations.[13] Many death row inmates represented by counsel have been able to meet the heavy burden imposed by Strickland v. Washington, 466 U.S. 668 (1984), by establishing

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(Footnote 12 continued from previous page)
Int'l, Dec. 22, 1987 story (LEXIS, Nexis library, current file).

[13] As this Court has recognized, "collateral review will frequently be the only means through which an accused can effectuate the right to counsel," because "[a] layman will ordinarily be unable to recognize counsel's errors and to evalute counsel's professional performance" * * * [and thus] will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (citation omitted).

both the ineffectiveness and prejudice necessary to prevail on such claims.[14]

In most cases, the petitioner must present substantial evidence from outside the trial record in order to set forth a viable Sixth Amendment claim. An example is Curry v. Zant, 258 Ga. 527, 371 S.E. 2d 647 (1988).

Curry's trial counsel failed to seek an independent psychiatric evaluation, although the trial judge had said he would allow one. A state psychiatrist had concluded that while Curry suffered from organic brain damage and a borderline personality disorder, Curry might be malingering and manipulating. After pleading guilty and then being sentenced to death, Curry sought post-conviction relief. In state habeas proceedings, volunteer counsel presented evidence from three mental health experts and other witnesses. They established that Curry was mentally retarded, suffered from severe mental illness, was incapable of waiving his constitutional rights, and either could not tell right from wrong or else could not control an impulse to act wrongfully. Id., 258 Ga. at 528-29, 371 S.E. 2d at 648-49. The Georgia Supreme Court held that the Sixth Amendment was violated by the failure to secure and present an accurate account of Curry's mental disabilities. Id., 258 Ga. at 530, 371 S.E. 2d at 649.[15]

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[14] See, e.g., Evans v. Lewis, 855 F.2d 631, 636-39 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642, 651-55 (11th Cir. 1988); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Ruffin v. Kemp, 767 F.2d 748, 752 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741, 744-46 (11th Cir. 1985) (per curiam).

[15] Curry exemplifies numerous cases in which a meritorious Sixth Amendment claim has been meaningfully presented only because volunteer counsel was available. Another example is
(Footnote continued)

Many other types of substantial constitutional claims have succeeded only because of counsel's exhaustive post-conviction investigations which could not have been done from death row. These include showings that pretrial publicity

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(Footnote 15 continued from previous page) Armstrong v. Dugger, 833 F. 2d 1430 (11th Cir. 1987). Trial counsel was held to have been ineffective after post-conviction counsel presented, inter alia, an expert who testified that -- unbeknownst to the trial jury -- Armstrong was mentally retarded and had organic brain damage. See also Jones v. Thigpen, 788 F.2d 1101, 1103 (11th Cir. 1986), cert. denied, 107 S. Ct. 1292 (1987) (trial counsel held ineffective for failing to present any mitigating evidence on behalf of defendant, whom expert testimony in federal habeas showed was mentally retarded and emotionally disturbed). Most decisions holding trial counsel constitutionally ineffective have been based on substantial evidence demonstrating both ineffectiveness and prejudice. E.g., Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986) (psychiatric, family, employment and school witnesses supported Sixth Amendment claim); Middleton v. Dugger, 849 F.2d 491, 493-95 (11th Cir. 1988) (comprehensive psychiatric history evidence introduced).

rendered the trial fundamentally unfair[16] and that a capital defendant was too mentally limited to have intelligently waived his constitutional rights to silence and counsel.[17] Moreover, without counsel to litigate in and obtain information from courts in other states, death row inmates would not even have known -- much less alleged and proved -- that their sentences were partially based on inaccurate infor-

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[16] E.g., Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986) (granting relief on claim based on pre-trial publicity, in view of substantial evidence collected and presented in habeas corpus proceeding).

[17] E.g., Smith v. Zant, 855 F.2d 712 (11th Cir. 1988) (granting relief in view of expert witness who testified in habeas corpus hearing that Smith was mentally retarded and under severe stress when waiving his Miranda rights). See also Agan v. Dugger, 835 F.2d 1337, 1339 (11th Cir. 1987), cert. denied, 108 S.Ct. 2846 (1988) (case remanded for hearing on Agan's competence, in view of evidence -- presented by habeas counsel -- of a history of mental problems dating back to Agan's youth).

mation about supposedly valid prior convictions, and thus were unconstitutional. See Johnson v. Mississippi, 108 S.Ct. 546 (1988); U.S. ex rel. Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987).[18]

The need for post-conviction counsel to uncover meritorious constitutional claims whose factual predicates have been totally unexplored by trial counsel may be particularly great in Virginia. Several respondents in a recent study on capital cases conducted for Virginia bar and legislative groups said the fact that Virginia is "at or near the bottom for attorney fees paid across the

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[18] Collateral litigation, such as that which led to the granting of relief in Johnson, is also often required to obtain discovery of (a) proceedings concerning co-defendants and (b) pretrial media coverage. See Mello, Facing Death Alone: The Post-Conviction Attorney Crisis On Death Row, 37 Am. U.L. Rev. 513, 545 (1988).

country" has led to inadequate representation by trial counsel.[19] Articulating the general frustration of Virginia trial counsel, one attorney said, "the most dedicated lawyer can only do so much with no help -- no investigators, no experts."[20] Moreover, the study found that Virginia has no formal or specific qualifications for trial lawyers in capital cases and that they received "quite limited training."[21]

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[19] See "Study of Representation in Capital Cases In Virginia" (November 1988), prepared for Criminal Law Section, Virginia State Bar and Joint Subcommittee Studying Alternative Indigent Defense Systems, Virginia General Assembly; prepared by the Spangenberg Group (cited hereinafter as "Virginia Study"), at 25.

[20] Id. at 28. Several respondents said support services and back-up resources were "largely unavailable." Id. at 27.

[21] Id. With respect to criminal cases generally, the study found that "by all measures, Virginia remains at or near the bottom in expenditures, cost per case and assigned counsel fees for indigent defense * * * [and] has slipped even further behind the rest of the nation [than in 1982] by 1986." Id. at 55.

2. Substantial Numbers Of Death Row Inmates Are Incapable Of Articulating Even Those Meritorious Claims Which Do Not Require Additional Investigation

As a recent law review article explains, many death row inmates cannot articulate even those meritorious claims which do not require further factual investigation, because they "are illiterate, uneducated, mentally impaired or any combination of the three."[22] A Florida federal district judge found in 1982, after extentive evidentiary hearings, that over half of Florida's overall prison population were functionally illiterate and 22% had I.Q.s under 80.[23] A 1979 study of Florida's death row inmates found that their mean educational level was approxi-

[22] See Mello, supra note 18, at 548.

[23] See Hooks v. Wainwright, 536 F. Supp. 1330, 1336-37 (M.D. Fla. 1982), rev'd on other grounds, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).

mately the 9th grade and that 15% had I.Q.s under 90.[24]

This Court[25] and the lower courts[26] have frequently decided cases involving inmates suffering from mental

[24] Lewis, Killing the Killers: A Post-Furman Profile of Florida's Condemned, 25 Crime and Delinq. 200, 211 (1979).

[25] See Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (severe emotional disturbance); Ake v. Oklahoma, 470 U.S. 68 (1985) (mental illness); Ford v. Wainwright, 477 U.S. 399 (1986) (severe mental illness). In a case presently before the Court, Penry v. Lynaugh, cert. granted, 108 S. Ct. 2896 (1988), there is substantial evidence suggesting that the petitioner is mentally retarded.

[26] See Lindsey, Curry, Armstrong, Jones and Agan, discussed supra; see also Smith v. Zant, 855 F.2d 712 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 1247 (1988); Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987); Magwood v. Smith, 791 F.2d 1438, 1449-50 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Wallace v. Kemp, 757 F.2d 1102, 1108 (11th Cir. 1985); Strickland v. Francis, 738 F.2d 1542, 1551-52 (11th Cir. 1984); Spraggins v. State, 258 Ga. 32, 33, 364 S.E. 2d 861, 863 (1988); Holloway v. State, 257 Ga. 620, 621, 361 S.E.2d 794, 796 (1987).

retardation or other substantial mental disabilities.

Inmates with mental disabilities frequently have difficulty assisting counsel who seek to protect their interests. They are hardly capable of formulating meaningful pro se petitions in the absence of counsel.[27] Moreover, as illustrated by Curry, Armstrong and Jones, discussed supra, the post-conviction cases of mentally disabled death row inmates often involve claims concerning their mental disabilities and require consultation with various types of medical and mental health professionals. Meaningful articulation and development of these claims requires competent counsel.

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[27] See Mello, supra note 18, at 550-52.

C. Volunteers Cannot Solve The Meaningful Access Problem

1. ABA Studies Highlight The Enormous Burdens Which Limit The Number Of Volunteer Attorneys Available To Handle State Post-Conviction Proceedings

Over a period of over two years, the ABA's Bar Information Program and other ABA and state bar and legislative groups have sponsored several comprehensive surveys of attorneys who have represented death row prisoners in state post-conviction (and federal habeas corpus) proceedings. These studies demonstrate that due to the enormous complexity of state post-conviction capital proceedings, attorneys have expended huge amounts of time and money and have become emotionally drained. Accordingly, the ABA is convinced that it is, and will continue to be, impossible to find sufficient volunteer attorneys to handle these cases on a pro bono basis.

A 1987 survey for the ABA of attorneys handling post-conviction proceedings in capital cases in 24 states revealed that the attorney hours were "extremely high" and the out-of-pocket expenses for state post-conviction plus federal habeas averaged well over $10,000.[28] In state post-conviction proceedings (encompassing trial level, state supreme court and certiorari), the median time for the entire sample of lawyers was

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[28] See "Time and Expense Analysis in Post-Conviction Death Penalty Cases" (February 1987), at 15, 20, prepared for ABA Post-Conviction Death Penalty Representation Project, ABA Section of Individual Rights and Responsibilities, ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program; Data Compilation and Analysis Performed by the Spangenberg Group, a national criminal justice research and consulting firm. The median expenses were $4,000 for the entire sample of lawyers and $13,556 for those who could document their time. The average expenses were $11,887 for the entire sample and $20,068 for those with documentation. See id. at 20.

665 hours. For those who could document their time, the median was 963 hours.[29]

Many of the volunteers who responded to this ABA survey commented on the substantial time commitments and complexity involved in handling these cases. One attorney, who has been involved in several types of major, protracted civil litigation, said:

> No case I have ever handled compares in complexity with my Florida death penalty case. * * * [T]here is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction.[30]

Another attorney said that death penalty litigation is unique in "every aspect of the case: research, investigation, time,

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[29] Id. at 13-14. Hundreds of additional hours were found to have been spent on federal habeas corpus proceedings. Id.

[30] Id. at 22.

length of pleadings, etc." and that the "emotional costs * * * border on the inhumane."[31] A third lawyer said that his firm's great expenditures had "led to a real opportunity to win this case," but added that, although he would like to take on a similar case in the future, "I will unfortunately be unable to do so because of the enormous potential expenses."[32] A fourth attorney said that he had never handled a case involving more work, and that "despite the tremendous number of hours expended thus far, I believe that I easily could have productively spent at least 50 percent more time on this matter than the exigencies of my practice and court schedules have allowed."[33] A fifth lawyer said he had "never seen such a

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[31] Id.

[32] Id. at 23.

[33] Id.

logistical nightmare, in the midst of the most difficult and time consuming case that I have handled in over 20 years of practice."[34]

In 1988, two additional studies using virtually the same methodology as the ABA's 1987 nationwide study focused on North Carolina[35] and Virginia.[36] The Virginia results for state post-conviction, and the comparable results concerning median attorney hours nationwide, in North Carolina and in Florida (for which figures were obtained as part of the nationwide study), are as

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[34] Id.

[35] "Time And Expense Analysis In Post-Conviction Death Penalty Cases In North Carolina" (June 1988), sponsored by ABA Bar Information Program; prepared for Administrative Office of the Courts, North Carolina; prepared by the Spangenberg Group (cited hereinafter as "North Carolina Study").

[36] Virginia Study, supra note 19.

follows:[37]

	Post-Conv. Trial Level	Post-Conv. State S. Ct.	Cert. from Post-Conv.	Total State Post-Conv.
Avg. Hours: Va.	633	235	124	992
Med. Hours: Va.	450	210	120	780
Med. Hours: Nat'l	400	200	65	665
Med. Hours: N.C.	482	92	38	612
Med. Hours: Fla.	500	240	77	817

The Virginia study also estimated the expenses for the first phase of state post-conviction, i.e., the trial level Circuit Court proceeding, but stressed that these estimates could be too low. The median expense was estimated at $2500 for that phase and the average expense at $3686.[38]

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[37] See id. at 37, 39. Total State Post-Conviction hours are the sum of the three other columns.

[38] See id. at 47-49.

As in the nationwide study, the North Carolina and Virginia studies quoted attorneys' descriptions of their experiences in representing indigent death row inmates in post-conviction proceedings. Attorneys described these cases as complex, exhausting, emotionally and financially devastating and extraordinarily time-consuming. Three typical descriptions (the first two regarding North Carolina, the third concerning Virginia) follow:

> - Post-conviction cases can have a devastating effect on an attorney both financially and emotionally. It consumes overwhelming amounts of time, energy and work. * * * For example, preparing the Motion for Appropriate Relief in state trial court took two full weeks of my time, that is, working all day, evenings, and weekends for two weeks on one case. The reason it takes such a lot of time is that you're scared to death that if you leave out an issue which a federal court in another district may decide favorably on

the next day, you have waived the issue forever.* * *

* * * * *

We are accused by judges and prosecutors of engaging in delay or dilatory tactics, but this is simply not true. They don't understand how much time and work it takes to locate a witness. In some cases they are dispersed all over the country. They could be anywhere. Then once you've located the witness it can take two or three trips to see him in order to convince him to answer your questions because somebody's life is at stake.[39]

* * * * *

These are horrible cases -- thankless cases. I had no idea how many hours I would have to spend when I got in on the case. There are so many needs in this area that it is mind boggling -- money, decent library, computers, tracking, full-time attorneys, investigators, brief bank. With no compensation there is no incentive for a lawyer to take a case. On the other hand, the Attorney General's Office has whatever resources it needs.

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[39] North Carolina Study, supra note 35, at 20-22.

They will pay whatever it takes. This is grossly unfair.[40]

It is apparent from these various studies that capital post-conviction litigation makes extraordinary demands on counsel -- professionally, financially and emotionally -- and that, as a result, many attorneys are unwilling to undertake such representation as volunteers. But only qualified, dedicated and properly guided lawyers can provide death row inmates with meaningful access to the courts.[41]

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[40] Virginia Study, supra note 19, at 50.

[41] Unfortunately, experience has shown that "constraints of time and finances" have caused many volunteers to do a poor job in handling post-conviction proceedings for death row inmates. (See Jt. App. 78.) But where the volunteers have had enough time, resources and guidance from attorneys with expertise in this area of the law, they have been able to do the serious factual and legal research which has frequently enabled them to demonstrate constitutional errors. (See Jt. App. 55-60, 67, 75-78.)

2. There Are, And Will Be, Insufficient Volunteers To Represent Death Row Inmates In State Post-Conviction Proceedings

Distinguished jurists have recognized, consistent with the various studies discussed above, that volunteers will not represent the growing numbers of death row inmates with cases entering state post-conviction and then federal habeas corpus proceedings. Justice Powell has noted that Florida began providing death row inmates with state-funded counsel in state post-conviction and habeas corpus proceedings "because of the inadequacy of using volunteer lawyers * * *."[42] Judge Godbold has pointed out that the demands on existing "volunteers became so heavy and the pressure of cases so intense that

[42] Remarks of Justice Lewis F. Powell, Jr. at Eleventh Circuit Judicial Conference, Atlanta, Ga. (May 12, 1986), at 8-9.

these traditional sources [of volunteers have] seriously diminished."[43] He has also summarized several important reasons why volunteers have been increasingly difficult to find in capital cases:

> Taking a habeas death case is not something most lawyers want to do. In the first place, it's hard. It is the most complex area of the law I deal with. In the second place, it's often done on an emergency basis. Third, the death penalty just isn't imposed on people for trivial things. The community is often inflamed. The press is often inflamed. The state trial judge is often inflamed if you question what he did. The trial counsel is often inflamed if you must question what he did. Your client seldom appreciates what you do and may end up accusing you of being ineffective counsel. And there isn't any glory in it.* * *[44]

Thus, as the several recent studies for the ABA and other bar and legislative groups show:

[43] Godbold, supra note 4, at 866.

[44] 14 Human Rights (see supra note 7), at 24.

> [T]he pool of volunteer lawyers cannot expand rapidly enough to meet the growing need. As all [the] studies demonstrate, the time and effort required for the representation of the indigent defendant on death row is enormous, and the rewards are intangible. No study can document the emotional cost associated with the representation of a person whose sole lifeline may be the volunteer attorney. Comments submitted by volunteer attorneys * * * reflect the frustration and disenchantment of some of these practitioners. While a valuable asset to representation of death row inmates, a system of volunteer counsel cannot be a long-term solution.[45]

D. For Meaningful Access To The Courts, Death Row Inmates Must Have Properly Qualified, Compensated, Assisted And Monitored Counsel

The ABA believes there are four essential requirements for according death row inmates meaningful access to state

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[45] Wilson and Spangenberg, State Post-Conviction Representation Of Defendants Sentenced To Death, (as-yet unpublished manuscript, Dec. 1988), at 19.

post-conviction courts. First, following direct appeals, qualified attorneys should be appointed to represent death row inmates in filing and litigating state post-conviction petitions. Second, the attorneys should be fairly compensated for both their time and their expenses, as should investigators, expert witnesses and others whose assistance is reasonably required for proper representation. Third, if these attorneys are not themselves experts in handling state post-conviction proceedings for death row inmates, they should be provided, at government expense, with guidance from attorneys who are experts in this area. Fourth, those experts should be responsible for monitoring the performance of the appointed attorneys, to ensure that they undertake sufficient factual investigations and appropriate legal

research and prepare competent pleadings and briefs.[46]

II.

VIRGINIA IS A RARE EXCEPTION TO THE GROWING TREND TOWARDS PROVIDING DEATH ROW INMATES WITH MEANINGFUL ACCESS TO THE COURTS

A. The Judiciary, The Bar And Congress Have Acted To Provide Death Row Inmates With Counsel

The judiciary, the organized bar and Congress have all recently taken actions designed to provide death row inmates with competent counsel in state post-conviction and federal habeas corpus proceedings.

Perhaps the first federal circuit court to do so was the Eleventh Circuit, which "got involved in it because we ran out of lawyers to file habeas petitions in death cases in the federal system."[47] Justice Powell complimented the Eleventh Circuit for its efforts in this area in 1986 and stressed that "perhaps the most critical need is an organized program for the representation by counsel of death row prisoners."[48]

In February 1987, the Conference of Chief Justices, which consists of the chief judicial officers of every state and territory and the District of Columbia, urged the judicial leadership in each state having the death penalty to take action to assure that death row inmates receive competent legal representation in post-conviction proceedings. The Chief Justices resolved that each state's judi-

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[46] The experts should notify the court if an appointed attorney's work is inadequate.

[47] 14 Human Rights (see supra note 7), at 23.

[48] Remarks of Justice Powell, supra note 42, at 8.

cial leadership should quickly begin a planning process involving executive and legislative representatives, the organized bar, and prosecutors and defense counsel experienced in death penalty litigation "to establish a regular process for appointing, providing expert guidance for, and fairly compensating competent counsel to prepare and pursue state post-conviction petitions for all state death row inmates wishing to pursue such remedies * * *."[49]

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[49] Resolution IX, "Representation of Death Row Inmates In Post-Conviction Proceedings," adopted at the 10th Midyear Meeting of the Conference of Chief Justices on February 5, 1987, in Gleneden Beach, Oregon (emphasis added). The Chief Justices also proposed that each state's judicial leadership enter into a dialogue with representatives of the federal courts "to assure continuity of representation of death row inmates in state and federal post conviction proceedings and an equitable apportioning of the costs of such representation between the state and federal judicial systems." Id.

The ABA has recognized the need for the organized bar to play an active role in the creation of the kind of program which Justice Powell and the Conference of Chief Judges have advocated. Following a vote of its Board of Governors in August 1986, the ABA has committed significant resources to the ABA Death Penalty Post-Conviction Representation Project. This project, which many sections of the ABA co-sponsor,[50] is attempting to find volunteers on a short-run basis while mounting "a nationwide educational campaign to convince state legislatures, courts, the Congress, bar associations and the public generally that the long-term

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[50] The project is co-sponsored by the Section of Individual Rights and Responsibilities, the Criminal Justice Section, the Litigation Section, the General Practice Section, the Senior Lawyers' Division, the Young Lawyers' Division and the Standing Committee on Legal Aid and Indigent Defendants.

systemic solution is * * * adequate state and federal public funding for this purpose."[51]

The adoption of a system of government funding is essential because there simply are not, and will not be, enough qualified volunteers to handle these cases properly. That is clear both from the experiences of the ABA's Post-Conviction Death Penalty Representation Project in attempting to find volunteer lawyers and from the ABA's studies discussed above. The ABA has found that, notwithstanding the generosity of many volunteer lawyers, the extraordinary burdensomeness and complexity of capital post-conviction proceedings make it infeasible to rely primarily on volunteers to

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[51] "Why Death Row Needs Lawyers," 14 Human Rights 27 (Winter 1987).

handle these cases. The ABA also believes that the quality of post-conviction petitions and supporting briefs will be enhanced by an organized system to provide qualified counsel. This should benefit the courts and the criminal justice system generally, as well as death row inmates.

In March 1987, paragraph 2.14B of the Guidelines for the Administration of the Criminal Justice Act was amended to make it easier to assure "continuity of counsel throughout the state court and federal habeas corpus proceedings * * *."[52] In proposing this amendment, the Judicial Conference Committee to Implement the Criminal Justice Act clearly

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[52] See March 24, 1987 memorandum from Administrative Office of the United States Courts to all federal appellate and district judges, magistrates, clerks, court executives and federal public/community defenders, at 5; Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987, at 38.

envisioned that well-qualified counsel would represent death row inmates in state post-conviction proceedings.[53]

Also in March 1987, the Judicial Conference of the United States recognized the value of such state-funded offices as the California Appellate Project in providing assistance to appointed counsel. The California Appellate Project provides appointed attorneys with resource materials, reviews of transcripts, ongoing consultation and comments on their draft pleadings, and it makes recommendations to the courts on attorneys' fees and expenses.[54] Relying, inter alia, on reports from state court officials on the benefits from using organizations such as the California Appellate Project, the Judicial Conference Committee to Implement the Criminal Justice Act successfully proposed[55] an amendment to the Guidelines for the Administration of the Criminal Justice Act, which now provide:

> Where necessary for adequate representation, subsection (e) of the Criminal Justice Act authorizes the reasonable employment and compensation of public and private organizations (such as the Florida Capital Collateral Representative and the California Appellate Project) which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc.[56]

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[53] See March 24, 1987 memorandum, supra note 52, at 5.

[54] Letter from Michael Millman to Gail Lambert of Washington and Lee Law School (March 19, 1987), at 2.

[55] March 24, 1987 Administrative Office memorandum, supra note 52, at 6-7.

[56] See id. at 7, quoting paragraph 3.16 of the Guidelines for the Administration of the Criminal Justice Act; Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987, at 38.

As mentioned above, the ABA in February 1988 urged the federal courts to approve plans for appointing trained, experienced and pre-screened attorneys to represent death row inmates in federal habeas corpus proceedings. The ABA said that under such plans, the attorneys should be (a) properly compensated, (b) provided with investigative, expert and other services and (c) advised by state and regional resource centers. The ABA also urged the federal courts "to consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency" in the provision of counsel to death row inmates in state and federal post-conviction proceedings.[57]

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[57] Resolution 125, approved by ABA House of Delegates at 1988 Midyear Meeting, at 3.

In September 1988, the Judicial Conference of the United States urged federal judges, districts and circuits to take essentially the same actions as the ABA had urged in its February 1988 resolution.[58]

Meanwhile, the ABA and the federal courts were working to encourage the creation of resource centers that, if funded with both state and federal funds, would provide expert legal consulting services to counsel representing death row inmates in state post-conviction and federal habeas corpus proceedings. In June 1988, the ABA's Post-Conviction Death Penalty Representation Project, in conjunction with the Administrative Office of the United States Courts, held a planning

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[58] See Paragraph 2.01G to the Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A.

conference to encourage applications for the funding of such centers.[59]

Resource centers in eight states had received federal funding by autumn 1988. Thereafter, Congress enacted the Anti-Drug Abuse Act of 1988, which provided federal funding for resource centers in five additional states.[60]

Congress took another important action in passing the Anti-Drug Abuse Act. It mandated, inter alia, that any indigent state prisoner under sentence of death "shall be entitled to the appointment of one or more" experienced attorneys and, when reasonably necessary, with "investigative, expert or other services" for

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[59] See Wilson and Spangenberg, supra note 45, at 6.

[60] See id.; Pub. L. No. 100-690, 102 Stat. 4181, Title X, c.I, reprinted in 134 Cong. Rec. H 11,216 (Daily Ed. Oct. 21, 1988).

federal habeas corpus proceedings under 28 U.S.C. § 2254 and any subsequent post-conviction and clemency proceedings.[61]

The statutory policy of this provision of the Anti-Drug Abuse Act will be frustrated if death row inmates lack qualified counsel in state post-conviction proceedings. Exhaustion of federal constitutional claims in state courts is a prerequisite to federal habeas corpus review, but without competent counsel in state post-conviction proceedings, death row inmates will frequently fail to raise meritorious claims in state court.[62] Thus, in order to effectuate Congress' legislative intent, competent counsel must

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[61] See Pub. L. No. 100-690, 102 Stat. 4181, Tit. VII, Sec. 7001(b), to be codified at 21 U.S.C. § 848 (q) (4)-(10), reprinted in 44 Crim. L. Rep. (BNA) 3001, 3018-19 (Nov. 2, 1988).

[62] See discussion at pages 13-28, supra.

be provided to death row inmates in their state post-conviction proceedings.

B. Virginia Is Virtually Unique In Failing To Move Towards Providing Death Row Inmates With Meaningful Access To The Courts

The most recent ABA-sponsored study indicates that Virginia is virtually unique in failing to move towards providing death row inmates with meaningful access to state post-conviction courts. While many other states have not yet succeeded in providing meaningful access in such proceedings, almost all of them -- unlike Virginia -- are moving towards doing so.

Of the thirty states in which death penalty cases have been the subject of state post-conviction proceedings, fourteen provide primary representation "either by a statewide public defender appellate unit or an independent state appellate program." In eight states,

"local trial public defenders or contract programs" are the primary source for representation. Virginia is one of only seven states which use volunteer lawyers as a primary source of representation.[63] Five of those seven states (Alabama, Georgia, Louisiana, Mississippi and Texas) "have begun operation of resource centers with a combination of federal, state and private funds."[64] These resource centers will endeavor to find counsel to represent death row inmates in state post-conviction proceedings and may, in a few instances, provide such representation themselves.[65]

Of the other two states -- Virginia and Arkansas -- Arkansas has not

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[63] Wilson and Spangenberg, supra note 45, at 10-12, 19 and Table 2.

[64] Virginia Study, supra note 19, at 70.

[65] See id.; Wilson and Spangenberg, supra note 45, at 13.

executed anyone since before Furman v. Georgia, 408 U.S. 238 (1972). Virginia, however, has carried out seven post-Furman executions.[66] Thus, Virginia is the only state which primarily relies on volunteer lawyers, has no resource center, and has nevertheless been executing death row inmates.

The ABA has also recently examined "the practice of providing counsel before the filing of a state post-conviction petition in capital cases."[67] The study found that of the thirty states where death row inmates have had state post-conviction proceedings, seventeen "provide counsel pre-petition in all cases

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[66] See NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1988), at 3.

[67] See Wilson and Spangenberg, supra note 45, at 12.

either through the requirements of state law or as a matter of practice."[68] Six additional states provide counsel pre-petition "in 'most cases' or 'frequently.'"[69] Information was not yet available on Utah, Arkansas and Texas, but Texas does have a resource center which will presumably endeavor to find counsel pre-petition.[70] Only four states -- Pennsylvania, Nebraska, Nevada and Virginia -- were reported not to have any system "to assure provision of counsel prior to the filing of a post-conviction petition."[71]

Of those four states, only Virginia has carried out involuntary execu-

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[68] Id.

[69] Id. at 12-13.

[70] See id. at 13.

[71] Id.

tions after Furman.[72] Indeed, since Furman, it has executed more death row inmates than all but four other states.[73] In the two states for which there is no information and which do not have resource centers, there has been only one involuntary execution (in Utah).[74]

Hence, Virginia is the only state to have involuntarily executed death row inmates which has no system to assure the provision of counsel prior to the filing of state post-conviction petitions in capital cases.

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[72] See NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1988), at 3. Nevada has executed two inmates who voluntarily gave up appeals. Id.

[73] See id.

[74] See id. Utah has also executed two inmates who voluntarily gave up appeals. Id.

CONCLUSION

Meaningful access to a state post-conviction court in a capital case requires the provision of capable and properly compensated counsel prior to the filing of the post-conviction petition.

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Respectfully submitted,

ROBERT D. RAVEN
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Attorney for the
American Bar
Association As
Amicus Curiae And
Counsel of Record

RONALD J. TABAK
GEORGE H. KENDALL
SARA-ANN DETERMAN
CLIFFORD STROMBERG
Of Counsel